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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	Trans. No. 2433, 2449
Southwestern Bell Telephone Company	)	
Tariff F.C.C. No. 73	)	CC Docket No. 95-140
	)	

REPLY OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Pursuant to the Order Designating Issues for Investigation released August 25, 1995, in the above docket, the Association for Local Telecommunications Services ("ALTS") hereby replies to the Direct Case of Southwestern Bell ("SWB"), and renews its request that the Commission reject the above-referenced tariff proposal.

I. SWB'S PROPOSED "RFP" RATES ARE A MANIFEST VIOLATION OF THE COMMISSION'S OUTSTANDING ORDERS.

SWB's direct case offers no new arguments in support of its request for Individual Case Basis pricing in situations involving Requests for Proposals ("RFPs"). SWB continues to argue that its request is consistent with the Commission's holding in Local Exchange Carriers' Individual Case Basis DS-3 Service Offerings ("DS-3 ICB Order"), 4 FCC Rcd 8634 (1989), in which (according to SWB in its D&J at p. 2) the Commission held that:

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> "the LECs have demonstrated that competitive conditions may justify some departures from a single general offering of DS-3 facilities. We do not intend to determine the precise limits of future DS-3 pricing flexibility in this proceeding"

Unfortunately, SWB silently omitted the critical opening phrase from the above quotation: "At most, the LECs have demonstrated that competitive conditions ... " Instead of being a broad grant of authority to publish competitive tariffs, as SWB tried to suggest in its D&J, this quote actually minimizes the need for any such filings based on the record in the DS-3 ICB Order.

SWB also quotes in its D&J from the Commission's conditions for ICB pricing in Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923 (1984); "Private Rate Guidelines"), which amply demonstrate why the proposed tariff is flatly unlawful (D&J at 2):

> "(1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems - is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users." (Emphasis supplied.)

SWB's new offering is obviously not "reasonably designed to meet competition without undue competition." Exactly the opposite is the case. SWB can discount rates to the issuer of the RFP under this proposal, but all other customers -- including SWB's competitors -- using the same services in the same volumes

over the same routes are not entitled to use the tariff. A tariff which excludes every customer except its target is the very epitome of discrimination, and cannot possibly qualify under the Commission's ICB pricing rules.

The point here is neither subtle nor nuanced. If SWB is correct, then the Commission's DS-3 ICB Order -- indeed, the very anti-discrimination prohibitions of the Communications Act (see Part II, infra) -- will become meaningless. This is true for two reasons. First, as noted above, SWB's proposal is strictly a "rifleshot" discount. No one except the intended customer can ever take advantage of it. Two, the "logic" of using an RPF as an excuse for evading the DS-3 ICB Order cannot be limited, as SWB concedes in its direct case (at pp. 5-7). Even the most monopoly-bound of SWB's customers can scratch out an "RFP," and thereby enable SWB to run free of the anti-discrimination provisions of the Act.

Indeed, GTE recently proclaimed this same theory in a proposal which would permit discounted DS-3 pricing in situations involving a government RFP (GTOC Trans. No. 988). As ALTS pointed out in protesting GTE's tariff, so arbitrary and unique a trigger for a tariff offering is the very antithesis of the "general offering" demanded by the Commission.

The Commission has already considered and rejected in its DS-3 ICB Order the kind of proposition GTOC and SWB are trying to resurrect (at ¶39):

> "Southwestern states that its customers have unique needs and that it must have the flexibility to meet those needs. Otherwise, Southwestern contends, its competitors will price services below Southwestern's averaged tariff rate and will capture all low cost applications. As a result, Southwestern argues, its rates will be driven higher."

This is identical to the arguments GTOC and SWB now offer for their present filings (SWB D&J at 4):

> "Under the economic analysis presented below, the discount that will be offered will attempt to keep this business on SWBT's network, and will produce contribution that will promote reasonable rates and efficient services for all users ...."

II. SWB'S PROPOSAL PLAINLY VIOLATES THE COMMUNICATIONS ACT.

The Commission's discussion of the discrimination requirements of the Communications Act of 1934 in its DS-3 ICB Order is plainly pertinent here (at ¶72):

> "Southwestern's description of its ICB ratemaking methodology perhaps best summarizes the LECs' ICB philosophy. According to Southwestern, 'absent competitive necessity or costs that exceed rates, [Southwestern] charged the same rate to DS3 customers under like conditions.' Southwestern appears to believe that simply demonstrating that discrimination is not irrational (inasmuch as the carrier can provide some explanation for the discrimination) is sufficient to demonstrate that it is not unreasonable."

As the Commission clearly indicates in the above passage, the fact that GTOC or SWB has a strong economic motive for discounting rates in competitive situations does not dispense with the statute's broad requirement of non-discriminatory rates. Furthermore, the narrow situation in which the Commission might countenance competitive factors in the pricing of a DS-3 tariff offering under its Private Rate Guidelines Order is clearly not presented here. The Commission need only note that the second

criterion of the Guidelines order -- that the "terms of the discounted offering are reasonably designed to meet competition without undue discrimination" -- is manifestly absent.

Furthermore, SWB's proposed tariff, like GTE's proposed tariff, does not demonstrate any necessary link between the "RFP" transmittals and genuine compelling competition. Indeed, it is easy to predict widespread issuance of "RFPs," regardless of whether bona fide competition actually exists, as customers scramble to benefit from SWB's discriminatory rates.

SWB simply surrenders on this point in its direct case (at p. 5):

> "SWBT cannot generally determine, nor should customers be required in competitive bid situations to disclose, the existence of other bidders. All SWBT can do is to verify that the customer is aware of the conditions imposed by the tariff. In fact, if the customer is required to disclose any information (besides the simple acknowledgment that the RFP was issued to more than one bidder) the process is contaminated ... The existence of the RFP itself, whether or not other vendors choose to participate, constitutes a competitive bid situation. To determine otherwise would be to presume that SWBT's customers would make a charade of an RFP in order to obtain favorable pricing from SWBT." (Emphasis supplied.)

This is an awesome defiance of logic. Most certainly SWBT's customers would choose to make a "charade" of the RFP process if it saved them money on their telecommunications services -- and that would also include customers which currently lack any competitive alternatives, i.e., SWBT's classic monopoly customer base.

Unfortunately, the Common Carrier Bureau has placed SWB's tariff out for public comment rather than simply reject it as manifestly unlawful under the DS-3 ICB Order and the anti-discrimination provisions of the Act (DA 95-1867, released August 25, 1995). ALTS respectfully suggests that proposals which effectively eviscerate the DS-3 ICB Order as well as the Act itself cannot be cured by comments. See MCI v. FCC, 114 S.Ct. 2223, 2233 (1994): " ... our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934." The Commission should enforce the plain meaning of its DS-3 ICB Order and the Act by rejecting SWB Transmittal No. 2433 and 2449.

III. SWB CANNOT SEEK ICB PRICING RELIEF VIA THE TARIFF PROCESS.

In addition to the clear legal precedents which preclude SWB from attempting to issue its "RFP" tariff, the Commission's rules are clear that LECs are not entitled to seek this particular relief. The DS-3 ICB Order explained that (at ¶66):

> "Our expressed expectation that carriers would replace ICB pricing with generally applicable rates and regulations was, of course, based upon our understanding of the obligations that Section 202(a) of the Communications Act imposes upon carriers. Although the Act does require the carriers to establish charges that do not result in 'unreasonable' discrimination among customers of 'like' telecommunications services. This obligation is normally interpreted as requiring that carrier offerings be generally available to all similarly situated customer. See Sea-Land Service, Inc., v. ICC, 738 F.2d 1311, 1317 (D.C. Cir. 1984)."[1]

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[1] See also the Second NPRM in CC Docket No. 94-1 (infra at 64): "The ICB rate must be used only as an interim measure, and the

Since SWB admits that the offerings it would issue as ICBs are identical to currently tariffed common carrier offerings, SWB is plainly not entitled to seek ICB treatment. It therefore follows that SWB must be seeking the right to file contract tariffs in RFP situations.

But SWB cannot publish contract rates through a tariff proposal. Commission Rule 61.3(m) defines "Contract-based tariff" as a "tariff based on a service contract entered into between an interexchange carrier subject to §61.42 (a) through © or a nondominant carrier and a customer." Since SWB qualifies as neither, it must first obtain a waiver to publish a contract rate, and its present tariff must be rejected.

Finally, even if SWB were entitled to ICB relief, this general issue has recently been squarely raised in Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Second NPRM released September 20, 1995, at ¶¶61-65: "We specifically propose requiring a LEC seeking to offer a common carrier service, except for special construction, at ICB rates to show in the supporting documentation that the service is so unlike any existing service that the LEC would have no reasonable basis to develop generally available rates." Allowing SWB's RFP tariff to go into effect would effectively prejudge this issue in CC Docket No. 94-1.

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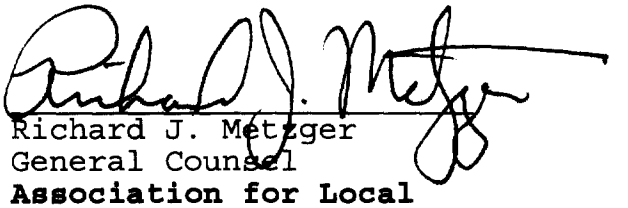
carrier must develop averaged rates within a reasonable period of time."

CONCLUSION

For the foregoing reasons, the above tariff transmittal should be rejected.

Respectfully submitted,

By: 

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September 25, 1995

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply of the Association for Local Telecommunications Services was served September 25, 1995, on the following persons by first-class mail or hand service, as indicated.

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